U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: SAN FRANCISCO DISTRICT OFFICE Date: NOV 01 2004

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(i)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, San Francisco. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted and the previous decisions of the district director and the AAO will be affirmed.

The record reflects that the applicant is a native and citizen of Nicaragua, who was found inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for misrepresentation of her immigrant intent in procuring entry to the United States as a nonimmigrant. The record reflects that the applicant is the spouse of a U.S. citizen. The applicant seeks a waiver of inadmissibility in order to remain in the United States to reside with her spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, *Application for Waiver of Grounds of Excludability,* accordingly. *Decision of the District Director* (September 19, 2002). The decision of the district director was affirmed on appeal by the AAO. *Decision of the AAO* (April 16, 2003).

The regulations governing these proceedings, 8 C.F.R. § 103.5(a), state in pertinent part:

> (2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .
>
> (3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service [now USCIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion is styled as a *Motion to Reconsider.* In addition to asserting that the AAO applied the incorrect legal standard in sustaining the district director's finding of no extreme hardship to the applicant's husband, counsel submits new evidence including, among other things, a "psychosocial evaluation," nurse's letter, employer letters, tax records, and documentation of country conditions in Nicaragua. The entire record was considered in rendering this decision.

Section 212(a)(6)(C)(i) of the Act provides:

> In general.—Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

8 U.S.C. § 1182(a)(6)(C)(i). The district director based the finding of inadmissibility under this section on the applicant's having misrepresented her immigrant intent in order to procure entry to the United States.

*Decision of the District Director* (September 19, 2002) at 1. The decision of the district director states, "When queried on May 1, 2002, about the non-immigrant visa the applicant obtained at the United States Embassy in Managua, Nicaragua, the applicant admitted she failed to tell the embassy her fiancé was in the United States. The applicant's willful misrepresentation effectively shut off a line of inquiry that was pertinent to the applicant's eligibility for a visa. Had the true facts been known, the applicant's application for a visiting visa would have been denied." *Id.*, at 3. The decision of the AAO dismissing the applicant's appeal quoted this language and further stated, "[t]he applicant is a native and citizen of Nicaragua who made a material and willful misrepresentation at the time of her non-immigrant visa interview." *Decision of the AAO,* at 2. In these proceedings, the AAO notes that the record reflects that the applicant obtained her non-immigrant visa in 1997, when she was still married to another individual and was not engaged to her present husband. *See U.S. Visa Control N. 19970286770050* (issued January 28, 1997), *Divorce Certificate* (registered February 14, 2001). Therefore, the prior decisions of the district director and AAO are erroneous to the extent the inadmissibility determination was based in part on the conclusion that the applicant made a material misrepresentation at an interview for a nonimmigrant visa.

The remaining evidence that the applicant misrepresented her immigrant intent in order to procure admission to the United States includes a sworn statement, obtained by the adjudicating officer below and signed by the applicant, which states in full, "I came to the United States to get married and stay." *Record of Sworn Statement in Affidavit Form* (May 1, 2002). This statement of the applicant was obtained to confirm the adjudicator's suspicion, initially triggered by the fact that she married three days after her entry to the United States, that the applicant's immigration to the United States was preconceived and she misrepresented her immigrant intent upon entry into the United States. The affidavit of her husband explains that their shared intent at the time of the applicant's entry was to get married and afterwards have her return to Nicaragua and await approval of the appropriate petitions and applications before re-entering to reside in the United States. *Affidavit of Juan Pablo Medina* (May 18, 2002). They changed their minds and decided she should stay in the United States after consulting with an immigration attorney. *Id.* The question of whether the applicant made a material misrepresentation to gain admission to the United States thus appears to hinge on the applicant's intent at the time of her inspection and admission into the United States. If she intended to remain permanently in the United States, she misrepresented her immigrant intent, which clearly was material to her eligibility for admission as a nonimmigrant. If she intended to return to Nicaragua and later changed her mind, it would appear that she made no material misrepresentation to support a finding of inadmissibility. The difficult undertaking of assessing the intent of an individual at a particular point must take into account the objective evidence in the record. The AAO notes, without specifically finding, that examples of evidence of intent to return home rather than stay in the United States might include a copy of the return portion of the applicant's round-trip ticket to Nicaragua, evidence of her continuing employment in Nicaragua, her maintenance of a separate residence in Nicaragua, or other objective documents that might tend to show her intent to return to Nicaragua and lack of intent to remain in the United States. The record does not contain this evidence, or any evidence of intent other than the sworn, but self-serving, statement of the applicant's husband, which appears to contradict the applicant's sworn statement before the adjudicator. In these proceedings, "the burden of proof shall be upon [the applicant] to establish that he is not inadmissible under any provision of [the] Act . . .." INA § 291, 8 U.S.C. § 1361. The BIA has held, where the applicant is "responsible for ambiguities in the record, . . . it is incumbent upon [the applicant] to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho,* 19 I&N Dec. 582, 591-592 (BIA 1988). In view of her sworn statement below and the absence of objective evidence of nonimmigrant intent at the time of her entry, the applicant has not met her burden to show that she is not inadmissible, and the district director's finding of inadmissibility under INA § 212(a)(6)(C)(i) is affirmed.

Section 212(i) provides, in pertinent part:

> (i) (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien . . ."

8 U.S.C. § 1182(i)(1). Hardship to the alien herself is not a permissible consideration under the statute. A section 212(i) waiver is therefore dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawful permanent resident spouse or parent of the applicant.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA1999). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (BIA)) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case.

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

The AAO notes that counsel asserts the relevance of certain factors from cases and legal support that derive authority from statutes that governed the now-repealed form of relief known as suspension of deportation prior to April 1, 1997. *See, e.g., Matter of Anderson,* 16 I&N Dec. 596 (BIA 1978). Factors cited by counsel include, with respect to the applicant alien, age, family ties in the United States and abroad, and other available means for adjusting status. These factors generally constitute evidence that would tend to show that the applicant herself would undergo extreme hardship if removed from the United States. As noted above, hardship to the applicant herself is not a permissible consideration under the statute that governs the instant application for waiver. Counsel's contention that these factors should apply equally to the determination under section 212(i) of the Act is in error. "Cross-application" of extreme hardship standards between different benefits, such as suspension of deportation as it existed prior to April 1, 1997, and waivers under section 212(i) of the Act, is limited by the statutes under which eligibility is determined. *See Cervantes-Gonzalez, supra,* at 565. Such cross-application of administratively and judicially developed factors is intended to foster consistency in interpreting substantially similar statutory requirements, but may not be used to undermine or otherwise alter the terms of the applicable statute. Therefore, the factors cited by counsel and above in this paragraph are generally not relevant to the determination under section 212(i) of the Act and may be taken into account, if at all, only as to how those factors contribute to the hardship faced by the qualifying relative, not the applicant herself, or in the exercise of discretion after statutory eligibility is established. If, in a particular case, any of the above factors are not present or not relevant to that determination, the law provides that they need not be considered. *Cervantes-Gonzalez, supra,* at 566 ("not all of the foregoing factors need be analyzed in any given case, we . . . apply those factors to the present case *to the extent they are relevant* in determining extreme hardship to the respondent's spouse.") (emphasis added).

The new evidence submitted by counsel does not overcome the prior finding of the district director, affirmed by the AAO, that the applicant has failed to establish extreme hardship to her husband [redacted]. The majority of the family therapist's statement restates the emotional impact on the family as a whole. *Psychosocial Evaluation by Lucia Hammond, M.F.T.* (May 3, 2003). The additional documentation of his health conditions do not support a finding that [redacted] health conditions result in extreme hardship if the applicant is refused admission. The record indicates that he suffers from diabetes, high cholesterol, and high blood pressure. *See* Applicant's Exhibit 3. He must watch his diet, take medication for all three conditions, and closely monitor his blood sugar levels. *Id.* Stress aggravates diabetes and, in the long term, can lead to more serious health conditions. *Letter of Karen Noel, RN* (April 26, 2003). Although the couple expressed to the family therapist fears that he will be unable to work in the long-term, these fears are not borne out by the medical documentation. Rather, it appears that his health conditions are under control and do not require the specific presence of the applicant or medical treatment that would be unavailable in Nicaragua.

The record also contains information regarding the financial impact of the refusal to admit the applicant. Included are concerns regarding the financial burden of maintaining two households, loss of medical coverage if [redacted] can no longer work, and difficulty finding comparable employment in Nicaragua. *Psychosocial Evaluation, supra,* at 4-5. Tax documents submitted with the motion show that, in 2000, Mr.

Medina supplied 100% of the family's income. Applicant's Exh. 6. Elsewhere, it is mentioned that the applicant began working and earns $1000 per month, but there is no documentation of her employment on the record in order to fully assess the financial circumstances.

The record has also been supplemented to show that the couple purchased a home in 2003. Applicant's Exh. 7. The AAO notes that, as the home was purchased well after the couple was aware of the applicant's potential inadmissibility, it is appropriate to accord less weight to this after-acquired equity. *See Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991) (holding that less weight is given to equities acquired after a deportation order has been entered); *Carnalla-Nunoz v.INS,* 627 F.2d 1004 (9th Cir. 1980) (holding that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight); *Ghassan v. INS,* 972 F.2d 631, 634-35 (5th Cir. 1992) (holding that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper).

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that he would face hardship rising to the level of "extreme" if he either remains in the United States or relocates to Nicaragua and the applicant is refused admission. The BIA has held, "[t]he mere election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed." *See Matter of Mansour,* 11 I&N Dec. 306, 307 (BIA 1965). Rather, the record demonstrates that he will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is refused admission from the United States.

Congress provided for a waiver of inadmissibility, but under limited circumstances. In limiting the availability of the waiver to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai,* 19 I&N Dec. 245, 246 (BIA 1984). The facts and documentation in this case do not establish hardship rising to the level of "extreme" as envisioned by the statute and case law.

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under INA § 212(i), 8 U.S.C. § 1186(i).

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the previous decisions of the district director and the AAO will not be reversed.

**ORDER:** The motion is granted. The prior decisions of the district director and the AAO denying the waiver and dismissing the appeal are affirmed.